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No. 92-1000

In The

Supreme Court of the United States

October Term, 1992

LeROY MALDONADO, Personal Representative of the Estate of MARK P. MALDONADO, Deceased,

Petitioner,

v.

ANN JOSEY, Personal Representative of the Estate of Margaret Berry,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent, Ann Josey, Personal Representative of the Estate of Margaret Berry, respectfully prays that this Court deny Petitioner's request to issue a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals for the Tenth Circuit entered in the above entitled proceeding on September 16, 1992.

I. INTRODUCTION

This case involves the application of the doctrine of qualified immunity to an action brought against a

teacher[1] under 42 U.S.C. Section 1983. Petitioner, the personal representative and estate of a fifth grade student, alleges that the teacher deprived the student of his substantive due process rights by failing to protect and supervise the student on March 16, 1987 when he left the classroom and died of strangulation in the cloakroom within twenty minutes of leaving the classroom. On July 8, 1991, the United States District Court for the District of New Mexico granted Petitioner's Motion for Summary Judgment on the grounds of qualified immunity. The District Court held:

> On March 16, 1987, the law was not clearly established as to a teacher's duty to observe every student in class for the time the students are in class. The law is still not clearly established that there is a duty to protect children who are compelled by state law to attend school who are physically mistreated by school district employees. *Stoneking v. Bradford Area School District*, 882 F.2d 720, 724 (3rd Cir. 1989). There has been no showing of any cases addressing the failure to supervise students in a classroom. The Court in *Stoneking* could not find the law well established as to the sexual abuse of children in school. Therefore this Court cannot find the law well established as to the supervisory duty of a teacher in a classroom. At the time of [the student's] death, the law was not clearly established that grossly negligent, reckless or grossly

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[1] The original Complaint also asserted claims against the school's principal and superintendent. Summary judgment was also granted on these claims but Petitioner did not appeal the grant of summary judgment as to those claims.

> reckless failure to supervise a public school student may give rise to a Section 1983 Fourteenth Amendment substantive due process violation. [The teacher] is therefore entitled to qualified immunity.

Opinion of District Court at p. 2.

On September 16, 1992, the Court of Appeals for the Tenth Circuit (referred to herein as the "Court of Appeals") upheld the grant of summary judgment on the grounds of qualified immunity. In reaching its decision, the Court of Appeals stated:

> As a threshold inquiry to qualified immunity, we first must determine whether [the student's] allegations, even if accepted as true, state a claim for violation of any rights secured under the United States Constitution. See *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). The Due Process Clause of the Fourteenth Amendment provides that no state may 'deprive any person of life, liberty, or property, without due process of law.' Pursuant to 42 U.S.C. Section 1983, [the student's] claim invokes the substantive component of the Due Process Clause in that he asserts that, under the circumstances, the state was under a categorical obligation to protect [the student.] The Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), guides our determination of whether this categorical obligation arose.

Opinion of the Court of Appeals at page 4. After carefully and correctly analyzing *DeShaney* and other applicable cases, the Court of Appeals concluded:

> [C]ompulsory attendance laws do not impose the severe restraints on individual liberty that implicate the Due Process Clause of the Fourteenth Amendment. Although the facts of this case present a truly tragic situation, the Due Process Clause 'does not transform every tort committed by a state actor into a constitutional violation.'

Opinion of the Court of Appeals at page 14, citations omitted.

Petitioner has requested this Court to grant a Writ of Certiorari to review the decision of the Court of Appeals on the grounds that (i) the Court of Appeals' decision conflicts with decisions of other Circuit Courts; (ii) the Court of Appeals for the Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court; and (iii) the Court of Appeals has decided a federal question in a way which conflicts with this Court's decisions in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). As explained in detail below, Respondent respectfully submits that this Court need not review the decision of the Court of Appeals for the Tenth Circuit.

II. THE DECISION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT OR WITH DECISIONS OF DISTRICT COURTS IN OTHER CIRCUITS.

Petitioner asserts that the decision of the Court of Appeals for the Tenth Circuit in this case conflicts with

the decisions of the Court of Appeals for the Fifth Circuit in *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. pending*, U.S. Sup. Ct. No 92-908; *Lopez v. Houston Independent School Dist.*, 817 F.2d 351 (5th Cir. 1987); and *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207. Petitioner also seems to assert, without specifically saying so, that the decisions of various district courts in *Doe "A" v. Special Sch. District of St. Louis*, 637 F.Supp. 1138 (E.D.Mo. 1986); *Arroyo v. Pla*, 748 F.Supp. 56 (D.Puerto Rico 1990); *Pagano By Pagano v. Massepequa Public Schools*, 714 F.Supp. 641 (E.D.N.Y. 1989); and *Waechter v. School District No. 14-030*, 773 F.Supp. 1005 (W.D. Mich. 1991) conflict with the decision of the Court of Appeals for the Tenth Circuit in this case. However, the decision in this case does not conflict with any of these cases.[2]

The general rule of qualified immunity is that government officials will not be liable for their actions taken during the course of performing discretionary duties unless their conduct violates a clearly established constitutional right of which a reasonable person should have known. *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1990), citing the standard set forth in *Harlow v. Fitzgerald, supra*. In *Harlow*, the Court explained:

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[2] Most of these cases were decided after March 16, 1987 and therefore cannot be used to show that the student in this case had a clearly established constitutional right that the teacher should have known was violated when she failed to prevent the accident that gave rise to this case.

> On summary judgment, the judge appropriately may determine, not only the current applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate the subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.

457 U.S. at 818. Thus, in this case, the Court of Appeals correctly first inquired whether the student had a constitutional right to be categorically protected by his teacher from self inflicted injuries. In deciding that the student had no such right, the Court of Appeals did not need to decide, as the District Court specifically held, that the teacher did not violate any clearly established constitutional rights of which a reasonable teacher should know.

In evaluating whether any substantive due process rights of the student were violated, the Court of Appeals noted that this case did not implicate the substantive due process concerns addressed in cases such as *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Garcia By Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988); and *Stoneking v. Bradford Area Sch., Dist.*, 882 F.2d 720 (3rd Cir. 1989) (en banc), *cert. denied*, 110 S.Ct. 840 (1990), a/k/a *Stoneking II*, involving school children who are subjected to excessive corporal punishment or sexual abuse.[3] As stated in the Court of Appeals decision:

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[3] Again, the *Stoneking* decision was reached two years after the incident addressed in this case.

> In the corporal punishment and sexual abuse contexts, a state actor directly inflicts the harm on the student and thereby implicates the Due Process Clause which itself imposes limitations on state conduct. In contrast, this case does not directly implicate these substantive due process concerns because regardless of whether the school teacher could have prevented the harm, she did not directly inflict [the student's] injury.

Decision of the Court of Appeals at page 8.

The Court of Appeals went on to analyze the question of whether the state has an affirmative duty to protect individuals from life or liberty deprivations caused by the individuals themselves or by third persons. The Court correctly stated:

> The [Supreme] Court [has] recognized that this affirmative duty has been found to exist only in a few, limited situations. The state must provide adequate medical care to prisoners, see *Robinson v. California*, 370 U.S. 660 (1972); the state must provide involuntarily committed mental patients with services that are necessary to ensure their reasonable safety from themselves and others, see *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982); and suspects in police custody who have been injured while being apprehended by the police must be given medical care by the state, see *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983).

Decision of the Court of Appeals at pp. 5 and 6.

The Court of Appeals then decided that the facts presented in this case were more analogous to those presented in *DeShaney, supra,* (no duty to protect child

from being killed by father even after receipt of repeated reports of the father's abuse); *D.R. v. Middle Bucks Area Vocational Technical Sch. No. 91-1136*, 1992 WL 19115 (3rd Cir. Aug. 11, 1992) (no duty to protect student from molestation by other students); and *J.O. v. Alton Community Unit Sch. Dist. 11*, 909 F.2d 267 (7th Cir. 1990) (school did not have affirmative duty to protect students, stemming from special relationship, from abuse by teacher).[4] After reviewing these three cases, the Court of Appeals held:

> [W]e agree with the Third and Seventh Circuits and conclude that compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school. Under *DeShaney*, an affirmative duty to protect arises only when the state 'so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs'. . . . This type of restraint simply does not occur under New Mexico compulsory attendance laws.

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[4] The Court of Appeals noted that the Seventh Circuit in *Alton* distinguished *Stoneking II* on the grounds that the plaintiffs in *Alton* "argued that the authorities were liable only because of their special relationship with the students, not because they established or maintained policies allowing the action to occur." Decision of Court of Appeals at p. 12, n. 4. In addition, if the Court of Appeals found that *DeShaney*, *Alton*, or *D.R.* established a duty to protect, the Court of Appeals would then have to determine if such duty was established on March 16, 1987. As discussed in Section IV of this Brief, the Court of Appeals correctly did not reach this question.

Decision of the Court of Appeals at p. 13, citation omitted. The Court of Appeals also noted that two recent district court opinions recently reached the same conclusion. *See Dorothy J. v. Little Rock Sch. Dist. LR - C-91-801*, 1992 WL 113728 (E.D. Ark. May 28, 1992) and *Doe v. Douglas County Sch. Dis. RE-l*, 770 F.Supp. 591 (D. Colo. 1991). The Court of Appeals thus distinguished the cases which found an affirmative duty to protect, which involved certain types of restraints on liberty or a special relationship and a deliberate indifference to that relationship, from cases such as *DeShaney* and this case.

Petitioner argues that the decision of the Court of Appeals in this case conflicts with three opinions issued by the Court of Appeals for the Fifth Circuit. However, the *Taylor, supra, Lopez, supra,* and *Horton, supra,* decisions do not conflict with the decision reached in this case by the Court of Appeals for the Tenth Circuit. The *Taylor* case involved sexual harassment of a student by a teacher and the failure of school officials who had received repeated notices of such harassment to stop it. This decision fits squarely within the decision in *Stoneking II* and within the other cases distinguished from the case presently before the Court as those "holding that extreme corporal punishment, or sexual abuse and harassment by a school teacher or counselor, can violate the substantive due process rights of school children." Decision of the Court of Appeals at p. 7. Nothing in the *Taylor* opinion establishes that students have a substantive due process right to be protected from self inflicted injuries.

The *Lopez* case involved allegations of a school bus driver "acting in callous disregard of [a student's] constitutional rights", 817 F.2d at 355, for his failure to

intervene, despite the repeated requests of other students to do so, in a fight on the school bus which continued for half an hour before the student was rendered unconscious and for his further failure to assist in obtaining medical care for the student. The Court of Appeals for the Fifth Circuit made it clear that the bus driver would be liable for his failure to assist the student only if "the jury finds it rose to the level of callous indifference and was a cause of injury." 817 F.2d at 355. Thus, the *Lopez* decision also fits within those distinguished by the Court of Appeals as inapplicable to the present case.

Finally, the *Horton* case does not conflict with the decision of the Court of Appeals in this case. *Horton* involved the use of dogs to sniff students, their lockers and cars for contraband. In holding that the use of dogs to sniff students' lockers and cars did not violate the students' constitutional rights, the Court of Appeals for the Fifth Circuit referred to a duty of the schools to protect students "from the dangers posed by anti-social activities". 690 F.2d at 480. Nothing in the *Horton* opinion states that teachers would be personally liable to students if they failed to do so. In addition, nothing in the *Horton* decision indicates that students have a constitutional right to be protected from self inflicted injuries.

Similarly, none of the District Court decisions cited by Petitioner conflict with the Court of Appeals' ruling that the student in this case did not have a substantive due process right to be protected from his own actions. *Doe "A"* and *Waechter* involved injuries resulting from the affirmative blatantly abusive actions of the students' teachers. The Court in *Arroyo* specifically refused to find liability because the harm involved was not committed by

the teacher. *Pagano* involved a fact situation which alleged "deliberate indifference" to injuries to a student caused by other students after the school had received repeated complaints about the injured student's classmates' actions. Again, this situation is more analogous to *Stoneking II* or *Lopez*. Clearly then, Petitioner has cited no case which conflicts with the decision of the Court of Appeals for the Tenth Circuit in this case. Therefore, Respondent states that the Court of Appeals' decision does not merit the grant of a Writ of Certiorari by this Court under Supreme Court Rule 10.1.(a).

III. THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Petitioner argues that the Court of Appeals decided an important question of federal law which has not been, but should be, decided by this Court. Petitioner asserts, in the Caption to Section II of the Petition for Writ of Certiorari, that this question is "whether children who are required to attend school and thereby ordered into temporary daytime custody of state officials by compulsory education laws are constitutionally entitled to *some* level of protection from harm and to care for basic safety during school hours, and to what extent." Petition for Writ of Certiorari, p. 11 (emphasis added). Contrary to the inferences made by this statement of the question decided, the Court of Appeals did not decide that students are not constitutionally entitled to *any* protection. Instead, the Court of Appeals decided that the student in

this case did not have a constitutional right to be protected from injuring himself. Thus, the Court of Appeals affirmed the District Court's grant of summary judgment on the grounds of qualified immunity. As noted above, the Court of Appeals noted that the "Due Process Clause 'does not transform every tort committed by a state actor into a constitutional violation.' " Decision of Court of Appeals at p. 14, citing *DeShaney*, 489 U.S. at 202.

This ruling specifically left open the possibility that certain torts, such as those involving deliberate indifference to or callous disregard for the well-being or safety of students may implicate substantive due process rights. In fact, the Court of Appeals cited its own decision in *Hilliard v. City and County of Denver*, 930 F.2d 1516 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 656, 116 L.Ed.2d 748, in recognition of the fact that affirmative acts of excessive or cruel punishment may implicate substantive due process rights. In discussing the dicta in the *Hilliard* opinion which suggested that compulsory attendance laws implicate some substantive due process rights, the Court of Appeals said:

> Read in context, our discussion in *Hilliard* suggests only that a party pursuing a substantive due process claim under *Ingraham* must allege that she was subject to at least the same degree of restraint that the state imposed upon public school children. As we have already noted, however, the present case does not implicate the concerns that were addressed in either *Ingraham* or this court's decision in *Garcia* – namely, affirmative acts of excessive or cruel punishment.

Decision of the Court of Appeals at p. 10. Clearly then, the Court of Appeals did not decide the question of federal law that Petitioner states in the Caption to Section II of the Petition for Writ of Certiorari was decided. The Court of Appeals merely followed the prior decision of this Court, *DeShaney*, and held that, absent deliberate indifference, the state does not have a duty to protect individuals from deprivations caused by actors other than the state.

Perhaps the question Petitioner really wants this Court to decide is the question of how broad is the scope of the *DeShaney* decision. Not only is it not necessary for this Court to decide the question actually stated by Petitioner, or the question regarding the breadth of *DeShaney*, it would not be appropriate for the Court to do so at the present time. Again, this case involves the issue of qualified immunity, which by its very nature requires that the constitutional issues presented be evaluated to determine whether they were clearly established at the time of the incident that gave rise to the lawsuit.

Finally, Petitioner submits that "Maldonado is a 'Palsgraf' test for the Court to evaluate the limits of the *DeShaney* language that a specific predicament need not be known by the state actor", Petition for Writ of Certiorari at p. 15, and seems to argue that the Court should use this opportunity to define the scope of *DeShaney* and the rights of students within the "zone of danger" for purposes of liability under Section 1983. However, this argument does not accommodate the "competing state interests" acknowledged in *Harlow, supra*, and quoted in Section I above, between efficient state government and encouraging public service. It also fails to recognize the

fact that not all torts are constitutional deprivations and that therefore simple Palsgraf type tort analysis is not appropriate in the context of Section 1983 claims. In fact, this Court has repeatedly declined to narrowly define the rights that are redressable under Section 1983 and has applied the doctrine of qualified immunity to protect state employees from personal liability for actions or omissions which they could not reasonably have known constituted a violation of substantive due process. In order to prevent one liability free violation of each due process right, the courts have not required that the facts of the cases which "clearly establish" a particular right be identical to those then before the court. As stated in *Hilliard*, "the plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." 930 F.2d at 1518. Therefore any uncertainty regarding the scope of *DeShaney* may adequately be addressed with respect to specific facts as they are presented to the courts. Respondent respectfully submits that this Court need not grant Certiorari in the instant case in order to concisely state which fact situations will place a particular right within the "zone of danger" for liability under Section 1983.

Petitioner cites the dissenting opinion of Chief Justice Seymour in the Court of Appeals' decision and argues that under *Estelle v. Gamble*, 429 U.S. 97, 975 S.Ct. 285, 50 L.Ed.2d 251 (1976), *Youngberg*, and *DeShaney*, "[S]tate actors who *undertake* the care and 'functional custody' of individuals have a corresponding duty to provide a reasonably safe environment. The case, for *DeShaney* 'custodial duty' application is only bolstered by *compulsory*

attendance or confinement . . ." Petition for Writ of Certiorari at p. 12. Clearly, the decision of the Court of Appeals in this case and the cases cited therein acknowledge the practical realities in the differences between state custody in the sense of penal confinement and in public education. These decisions acknowledge that, in a public school situation, teachers are not free to act with indifference or callousness to students' situations but that, at the same time, teachers do not have a duty to prevent every conceivable type of harm which a student might suffer. This too is a logical accommodation of important but competing public policies.

For these reasons, there is no important federal question which this Court should decide in light of the Court of Appeals' decision in this case.

IV. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S DECISIONS IN *HARLOW* OR *ANDERSON* OR WITH OTHER CIRCUIT'S APPLICATIONS OF *HARLOW* AND *ANDERSON*.

Petitioner argues that the Court of Appeals' holding in this case rests upon an improper application of the doctrine of qualified immunity. Petitioner argues that the Court of Appeals somehow erred in stating first that "compulsory attendance laws do not impose the severe restraints on individual liberty that implicate the Due Process Clause of the Fourteenth Amendment" and by subsequently concluding that the teacher is entitled to qualified immunity. Petition for Writ of Certiorari at p. 17. However, the Court of Appeals and the District Court

correctly applied the doctrine of qualified immunity as enunciated by this Court in *Harlow, Anderson* and other decisions.

As stated in the Court of Appeals' decision, the threshold inquiry in evaluating the application of the doctrine of qualified immunity to a particular allegation under Section 1983 is to determine whether the allegations taken as true even state a claim for violation of any rights secured under the United States Constitution. Decision of Court of Appeals at p. 4. This is precisely what this Court directed the courts to do in *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991):

> A necessary concomitant to the determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

111 S.Ct. at 1793. This is the standard followed by the Court of Appeals in this case and by the Courts of Appeals for other Circuits. *See Peterson v. City of Plymouth, Minnesota*, 945 F.2d 1416 (8th Cir. 1991); *Hunter v. District of Columbia*, 943 F.2d 69 (D.C. Cir. 1991); *Quives v. Campbell*, 934 F.2d 668 (5th Cir. 1991); *Samaad v. City of Dallas*, 940 F.2d 925 (9th Cir. 1991); and *Federal Deposit Insurance Corp. v. Henderson*, 940 F.2d 465 (9th Cir. 1991). Obviously then, if the reviewing court determines that no constitutional right was alleged, the court need not address the remaining portions of the *Harlow* inquiry: whether that right was clearly established at the time of the incident that gave rise to the claim under Section 1983 and whether a reasonable official would know or should

know that his or her behavior violated such right. If the Court of Appeals in this case determined that, according to the decisions or analysis of any relevant case law, any of the student's constitutional rights had been violated, the Court of Appeals would then have had to determine whether such constitutional right was clearly established at the time of the student's tragic accident. However, because no constitutional right was found, the Court of Appeals did not continue the inquiry under *Harlow*. The District Court in this case did specifically conclude that the law was not clearly established as of March 16, 1987 so as to deprive the teacher of qualified immunity. This ruling does not conflict with the Court of Appeals' decision but merely takes it one step further.

Petitioner argues, however, that this Court should grant Certiorari because the courts of the different circuits vary with regard to how they review the second part of the qualified immunity inquiry, application of a clearly established constitutional right. In support of this argument, Petitioner cites no case law but does cite a law review article. Respondent disagrees with the statement that *Harlow* is applied differently by different courts. However, even if this is true, the decision of the Court of Appeals in this case correctly does not reach that element of the *Harlow* test. Therefore, even if this Court were to grant Certiorari in this case, the application of the second part of the *Harlow* inquiry would not properly be before the Court.

Petitioner seems to argue first that the analysis of the Court of Appeals in this case conflicts with the *Harlow* and *Anderson* decisions and then argues that the analysis of the Court of Appeals allows for "multiple bites of a

constitutionally forbidden fruit." Petition for Writ of Certiorari at p. 16, citing *Garcia*. It is not clear whether Petitioner is arguing that the particular application of the standards set forth in *Harlow* and *Anderson* used by the Court of Appeals in this case leaves open the possibility of "multiple bites" or whether Petitioner is arguing that the doctrine of qualified immunity as enunciated by this Court in *Harlow* necessarily leaves open this possibility. In either case, Petitioner is incorrect.

This Court has specifically held that, in order to accommodate the competing interests of efficient government and encouraging public service, state actors must be protected by qualified immunity. Therefore, state actors cannot be held personally liable for actions which have not previously been established to violate constitutional rights.

> When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees'. . . . On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk of fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. . . . Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

Anderson, 107 S.Ct. at 3038 (citations omitted). Among the cases cited in support of this statement is *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) which is summarized by this Court as holding that "qualified immunity protects all but the 'plainly incompetent or those who knowingly violate the law.' "

This Court in *Anderson* went on to further explain why a particular action must have been previously clearly established to constitute a violation of a constitutional right which escapes the protections of qualified immunity and why mere allegations of due process violations are insufficient to overcome the presumption of qualified immunity:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause and thus there is a sense in which any action that violated that Clause . . . violates a clearly established right . . . But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*.

107 S.Ct. at 3039.

Petitioner correctly cites *Stoneking II* as including a concise statement regarding the lack of a need for factual identity between a particular allegation and a prior case which clearly established a constitutional right. In *Stoneking*, the Court of Appeals for the Third Circuit explained:

> *Harlow* explicitly chose not to discuss the question of how to evaluate the 'state of the law' during prior periods, leaving this issue to lower courts. . . . This court does not require 'relatively strict factual identity' between applicable precedent and the case at issue. . . . Some but not precise factual correspondence to precedent would be required.

882 F.2d at 726, citing *Anderson*.

Petitioner continues, citing *Stoneking II*, *Anderson*, and *Harlow*, by explaining that the Court of Appeals erred in not inquiring whether the teacher "should have related . . . established law to the instant situation." Petition for Writ of Certiorari at p. 17. However, as explained above, the courts need not reach this inquiry unless they first determine that a violation of a constitutional right has been alleged. In this case, the Court of Appeals specifically determined, after examining *DeShaney* and other relevant decisions that no constitutional violation had been alleged; therefore there was no need for the Court to examine whether the alleged constitutional violation was "clearly established" on March 16, 1987 and whether a reasonable state actor should know that his or her behavior violated such right.

Petitioner next argues in Section III of the Petition for Writ of Certiorari that the Court of Appeals incorrectly failed to find a constitutional violation alleged in the Maldonado Complaint.

Petition for Writ of Certiorari at p. 19. This statement addresses the substantive merits of the Court of Appeals' decision and not the method of application of *Harlow* and *Anderson*, which is alleged by Petitioner in this Section of

the Petition to be the grounds for the grant of Writ of Certiorari. Nonetheless, the statement is incorrect. Petitioner asserts that *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) clearly established the right not to be deprived of life without due process of law and that the Court of Appeals erred in not addressing this case. *Bell* involved police brutality and cannot be used under the guidelines set forth in *Harlow* and *Anderson* to remove the presumption of qualified immunity in cases involving state actors who leave school children unsupervised for a few minutes.

Finally, Petitioner asserts that the Court of Appeals failed to follow the *Youngberg, Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), and *Ingraham*, cases. However, the Court of Appeals specifically cited *Youngberg* and *Ingraham* and stated that the facts of this case did not fit within the cases establishing a constitutional duty to be protected from abusive affirmative actions of state actors, or within the cases establishing a duty to protect when the state actor has acted with deliberate indifference. Decision of Court of Appeals at pp. 6 and 8. The Court of Appeals also cited *Ingraham* in acknowledging that excessive or cruel behavior by a teacher could violate the substantive due process rights of students. Nothing in the decision of the Court of Appeals in this case conflicts with the *Tinker* case, which involved the right of students to wear armbands and did not involve personal injury of a student. As explained in Section III of this Brief above, the Court of Appeals did not hold that students are not entitled to any constitutional protection, but merely that

New Mexico's Compulsory attendance laws did not create a constitutional right of students to be protected from self inflicted injuries.

V. CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to deny Petitioner's request to issue a Writ of Certiorari.

Respectfully submitted,

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